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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

PETITIONER'S REPLY BRIEF

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Respondent persists in making intellectually dishonest as well as deceptive statements in order to sustain an unconstitutional and illegal judgment of conviction. Four examples from respondent's brief in opposition in this Court will document the point.

Respondent's untrue statement that petitioner's counsel during oral argument in the Second Circuit conceded that petitioner's fifth point that the trial judge violated petitioner's right of silence had been irrevocably waived.

Respondent in its brief (p. 54) falsely gives the impression that counsel conceded during oral argument in the United States Court of Appeals for the Second Circuit that the petitioner's fifth point, namely, that the trial judge's statement to the jury violated the petitioner's right of silence under the Fifth and Fourteenth Amendment "had been irrevocably waived." This is not a fact, as this excerpt from the oral argument before the Second Circuit (only part of which respondent quoted) demonstrates:

> True, there was a federal statute involved in *Bruno,* but these decisions have a way of becoming the constitutional law, and I think that they violated his Fifth Amendment right and there wasn't anything that could have been done to cure it except a new trial.
>
> I will make one comment on the prejudical publicity.
>
> Judge Feinberg: Before you get to that, the D.A. says the Judge said this in his final charge to the jury and that no one objected.
>
> Mr. Rogge: There was not an objection. I don't think this can be cured. You are right. There wasn't an objection. [Mr. Rogge's point was that the trial judge's violations of petitioner's Fifth Amendment right of silence could not be cured, objection or no objection.] (Excerpted from p. 46 of minutes of oral argument.)

What was said, and what was the clear intent of what was said, as anyone who was present (as Mr. Eric A. Seiff, who helped write the respondent's brief, was) knew, was that the trial judge's violations of the petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments could not be cured in any way except by the granting of a new trial. Yet the respondent tries to twist counsel's words to mean just the opposite of what counsel said as well as the meaning thereof. Respondent then feigns to find it "difficult to understand how the petitioner can now challenge the charge" (p. 54).

Respondent's untrue statement that petitioner "knowingly waived" his illegal search and seizure point.

Respondent makes the untrue statement in a heading in its brief (p. 42), as well as in the argument under this heading, that petitioner "knowingly waived" his third point, namely, that the admission into evidence over objection and without a hearing of a chair obtained as a result of an illegal search and seizure violated his Fourth and Fifteenth Amendment rights. What actually happened, as the petitioner narrated in his petition (pp. 35-36), was this. Under sandbagging by the trial judge, and the withdrawal by the prosecutor of his offer into evidence of the illegally seized chair, as well as the trial judge's grudging agreement to hold a hearing when the issue next arose, the issue was postponed (pp. 388-593). Eight days later, when the prosecutor again offered the chair, and defense counsel respectfully reminded the trial judge of the judge's agree-

ment to hold a hearing, the trial judge summarily and without a hearing denied defense counsel's motion to suppress (pp. 1193-95).

Respondent's deceptive statement that Detective Kelly's ballistics report was in court on petitioner's subpoena.

Respondent in its brief (pp. 38-39) tries to create the false impression that Detective Kelly's ballistics report was in court on petitioner's subpoena and readily available to defense counsel. The truth of the matter is that this report was in court only on a general subpoena. Defense counsel would not have known how to ask for it, for he did not know about it, and would not have known about it unless Detective Kelly took the stand. The prosecutor, of course, did not put Detective Kelly on the stand, as the Court may well know.

Respondent's deceptive statement that petitioner did not attack the jury's verdict in the New York Court of Appeals.

Respondent in its brief makes the deceptive statement that "while the jury's verdict was challenged by Point XV of petitioner's seventeen-point brief to the Appellate Division, there was no attack against it in the New York Court of Appeals" (p. 4). Of course not. It could not be attacked there as counsel for respondent knows as well as anybody else. In this case the New York Constitution limited the jurisdiction of the New York Court of Appeals to the review of questions of law. Article 6, section 3a of the New York Constitution, adopted by the People on

November 7, 1961, effective September 1, 1962, specifically provides:

> a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

In an early case, *People* v. *Thompson,* 198 N.Y. 396, 91 N.E. 838 (1910), arising under an earlier but similar constitutional provision, the New York Court of Appeals held:

> The constitutional provision that no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict shall be reviewed by the Court of Appeals (Constitution, article 6, section 9) is unqualified in its language and precludes a review thereof by the Court of Appeals in criminal as well as in civil cases. (*People* v. *Mingey,* 190 N.Y. 61; *People* v. *Maggiore,* 189 N.Y. 514; *People* v. *Huson,* 187 N.Y. 97; *People* v. *De Garmo,* 179 N.Y. 130.) * * * 198 N.Y. at 399, 91 N.E. at 839.

Under the circumstances of this case, defense counsel would have shown themselves ignorant of the law if they had attacked the jury's verdict in the New York Court of Appeals.

Conclusion

The respondent compounds the obsolete and unconstitutional way in which it obtained the instant judgment of conviction by the specious way in which it tries to hold on to it. The Court should grant review, and hold that the trial of this case does not measure up to the standards of the uniform system of criminal justice which the Court has given us.

Respectfully submitted,

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June, 1969